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NTSB Order No. EA-4887

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 6th day of April, 2001

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket Nos. SE-16202,
)	SE-16212, SE-16211,
)	and SE-16210
ESTAN FULLER, WILLIAM SCHWAB,)	
EDWARD KNAPP, and TIMOTHY GEHRES,)	
)	
Respondents.)	
)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on March 14, 2001, at the conclusion of a two-day evidentiary hearing.¹ By that decision, the law judge reversed emergency orders of the Administrator revoking the airline transport pilot (ATP) certificates of the four respondents in

¹An excerpt from the hearing transcript containing the initial decision is attached.

this case, whose appeals were consolidated for hearing on their motion. The law judge concluded that the Administrator had not established her allegations that the respondents had falsified records relating to flight and ground training, in violation of section 61.59(a)(2) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61).² For the reasons discussed below, the appeal will be denied.³

The respondents, formerly contract pilots for the now defunct Sunjet Aviation, Inc. who were already fully qualified to operate that carrier's Lear 35 aircraft, were accused in the subject revocation orders of intentionally falsifying certificates of training that reflected that they had received the so-called "differences" flight and ground training prerequisite to their also serving as pilot-in-command on Sunjet's Lear 31 aircraft.⁴ The Administrator's accusations arose from an investigation following a crash of one of Sunjet's

² FAR section 61.59(a)(2) provides as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made:

* * * * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part....

³The respondents have filed a reply brief opposing the appeal.

⁴See, e.g., Adm. Exh. A-51 (certifying receipt of eight hours of Lear 31 ground training) and A-52 (certifying receipt of four hours of Lear 31 flight training).

aircraft that killed all aboard, including professional golfer Payne Stewart. In brief, the Administrator, whose inspectors did not attempt to interview the respondents in connection with their investigation, took the position that the certificates must have been falsified because other records suggested that the training could not have been accomplished (or completed) on the dates on the certificates,⁵ for reasons respecting the availability of either the aircraft or the instructor for training purposes.⁶

For a variety of reasons fully explained in the initial decision, the law judge believed the respondents when they testified that all required training had been received as attested to on the certificates; that is, *prior* to their service as pilots on the aircraft for which the training was required. In most instances, they were dated, after the student and the

⁵We do not agree with the Administrator that the law judge erred because he would not allow an amendment of the complaint some two weeks before the hearing that would have added additional certificates the Administrator also believed falsely claimed training that had not been received. The standard for amendment in an emergency case is not whether the amendment would have prejudiced the respondents, but whether it was supported by good cause. See Rule 55(e), 49 C.F.R. 821.55(e). The Administrator did not attempt to show good cause for the failure to include allegations concerning the additional certificates in the original complaint. It follows that the law judge did not abuse his discretion by rejecting the amendment.

⁶In this regard, we note that the certificates do not themselves purport to establish when any of the described training was taken or finished. Rather, they simply indicate the student's certification that training was received before he operated the aircraft pursuant to Sunjet's Part 135 authority. Respondents appear not to have maintained careful or thorough records of their training at Sunjet because it was not time for which they were paid and did not affect their ability to fly Lear jets for others.

instructor had verified their accuracy and signed them, not by the respondents, but by Sunjet's Director of Operations, the individual responsible for maintaining the training records for the carrier's pilots in their personnel files. He acknowledged that because of family medical problems during the relevant timeframe he had occasionally fallen behind in his record-keeping, a circumstance he believed may have contributed to his making mistakes in connection with the dating of the respondents' certificates and with the information on flight time and duty sheets prepared for them. While we share the Administrator's concern over the lack of reliable records to back up the training listed on the certificates, we do not agree, on this record, that the absence of such substantiation, however relevant that may be to the adequacy of the respondents' showing of differences training, proves that the certificates are false. The law judge could still reasonably conclude, as he did, that the respondents were being truthful when they testified under oath that they had received the training reflected on the certificates.⁷

⁷We understand that it is beneficial for regulators to be alert to the possibility that documentary discrepancies could signal noncompliance with safety requirements. At the same time, we do not agree that a presumption of dishonesty should attach to every record-keeping inconsistency an inspector uncovers, and we believe it should be the exception, rather than the rule, that an intentional falsification charge would be filed, much less prosecuted as an emergency, without the suspected falsifier's having first been given some notice of a perceived problem and an opportunity to dispel any suspicion of misconduct it had engendered. In a related vein, we have previously advised the Administrator of our view that: "our law judges are not obligated to find that documentary evidence offered by the Administrator is more reliable than the testimonial evidence given by the author of such documents..." and that the Board does

We find no merit in the Administrator's argument that the law judge applied some standard higher than preponderance of the evidence for the burden of proof in this matter. The law judge's observation, consistent with court and Board precedent alike, that the circumstantial evidence of intent in a falsification case must be "so compelling that no other determination is reasonably possible" (I.D. at 353), speaks not to the quantum of proof necessary for the Administrator to prevail, but to the probative quality of the evidence required to justify a finding of actionable scienter. Where, as here, a law judge credits the testimony of a respondent on the issue of intent to falsify, it is the predominate weight of that testimony in a case of this kind that tips the evidentiary scale away from a violation finding.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The initial decision is affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)
not "withhold the deference customarily afforded a law judge's credibility assessments simply because other evidence, of whatever description, arguably could have been given greater weight" (Administrator v. Crocker, NTSB No. EA-4565 (1997) at p. 6).